NO. 21242

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RONALD M. COLEMAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA,
CENTRAL DIVISION

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I

JURISDICTIONAL STATEMENT

On April 13, 1966, a one count indictment was returned by the Grand Jury for the Southern District of California, charging appellant with a violation of Title 18, United States Code, Section 659, Theft From Interstate Shipment [C. T. 17-18]. 1/

On April 25, 1966, appellant was arraigned and entered a plea of not guilty to indictment No. 36056 [C. T. 19].

On May 10, 1966, a superseding one count indictment was returned by the Grand Jury for the Southern District of California, charging appellant with a violation of Title 18, United States Code,

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1/ "C. T." refers to Clerk's Transcript of Appeal.

Section 659, Theft From Interstate Shipment [C. T. 2-3]. The indictment charged that on or about March 25, 1966, the appellant stole and unlawfully took and carried away, with intent to convert to his own use, from a platform, five shipments of goods, consisting of 25 cartons, having an aggregate value of over $100.

On May 11, 1966, appellant was arraigned on superseding indictment No. 36152 [C. T. 4]. The jury was impaneled on May 11, 1966 [C. T. 4]. Trial was held on indictment number 36152 on May 11, 12, 16, and 17, 1966 [C. T. 4-7]. On May 17, 1966, the appellant was found guilty as charged in the indictment [C. T. 7].

On June 15, 1966, the appellant was found to be 25 years of age and accordingly sentenced to five years' probation pursuant to the Young Adult Offenders Act, Title 18, United States Code, Section 5010(a) [C. T. 8-9].

Appellant filed a timely Notice of Appeal on June 27, 1966 [C. T. 10-12].

The offenses occurred in the Southern District of California, Central Division. The District Court had jurisdiction by virtue of Title 18, United States Code, Section 3231, and Title 18, United States Code, Section 659. This Court has jurisdiction to entertain this appeal under the provisions of Title 28, United States Code, Sections 1291 and 1294.

II

STATUTE INVOLVED

Title 18, United States Code, Section 659:

"Whoever embezzles, steals, or unlawfully takes, carries away, . . . from any station, station house, platform or depot . . . with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express; . . .

"Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both."

III

STATEMENT OF FACTS

The West Coast Cartage Company is a local agent for Acme Fast Freight. In that capacity West Coast Cartage Company receives freight from throughout the United States and delivers it within the Los Angeles area [R. T. 43-44]. 2/ It operates from a loading dock located in the downtown Los Angeles area. The

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2/ "R. T." refers to Reporter's Transcript of the Trial.

loading dock is 800 feet long by 60 feet wide and West Coast Cartage Company shares the facilities with certain other carriers [R. T. 47].

Freight is brought to the loading dock by railroad boxcars and semi-trailers. The freight is removed from the incoming cars by a night crew and placed upon the loading dock [R. T. 48]. The freight is then checked against a tally on each particular car to make sure that the freight which was scheduled to be on the car is present. The night crew then checks the tally against each piece of freight to determine from what departure door or "spot number" the freight will leave the loading dock. Each spot number represents an individual loading door from which one truck is to be loaded. West Coast Cartage loads its trucks from doors number 9 through 24. The remaining doors are used by other carriers [R. T. 86].

After determining the proper loading door the night crew marks the number of the departure door on the individual piece of freight with a green crayon [R. T. 50]. The freight is then loaded on a towvair to be taken to the proper departure door. The towvair is a four-wheel dolly which is placed on a continuous cable and is released from the cable and directed onto a spur leading to the departure door by a pre-set magnetic solenoid [R. T. 50-51, 90-91]. The freight is then unloaded from the towvair and placed on the floor in front of the departure door [R. T. 92]. If the freight is found at the door in a proper sequence for loading, one of the night crew may begin to load a truck at a particular loading door [R. T. 92].

When a truck driver arrives at work in the morning, he obtains his driver's load record in front of his departure door. The driver's load record consists of bills of lading routed in reverse order of delivery [R. T. 61]. The load record is prepared by the dispatcher and is routed in such a manner that the top bill will be his last stop and the bottom bill of lading his first stop [R. T. 61]. The driver uses this load record to sequence the loading of his truck. By following this procedure the last delivery for the day, which is represented by the top bill, will be at the front of his truck while his first delivery will be at the rear [R. T. 62]. When he loads his truck the driver is instructed to make certain notations and follow certain procedures with regard to his load record. If he finds all the freight shown on a bill of lading he loads the freight on his truck, circles the number of cartons indicated on the bill of lading and initials the bill of lading. This indicates to the dispatcher that the driver has all of the freight represented by a particular bill of lading on his truck [R. T. 62-63]. If the driver has more than one half of the freight indicated by a bill of lading, he would load the freight on his truck, mark the number of cartons loaded on the bill of lading, indicate the number of cartons he is short and initial the bill [R. T. 63]. If the driver is not able to find the freight, he folds his bill of lading in half. If the driver is only able to find less than one-half of the freight, he leaves the freight on the dock and folds the bill of lading [R. T. 64]. A folded bill of lading indicates to the dispatcher that freight is not on a driver's truck [R. T. 64]. The driver is instructed not to load

freight without a bill of lading [R. T. 71].

After a driver has finished loading his truck he takes his driver's load record to the dispatcher's office. The dispatcher takes the driver's load records and removes the folded bills [R. T. 64]. The folded bills are retained by the dispatcher so he can attempt to locate the freight. The dispatcher matches the remaining bill with two different copies and gives them to the driver for his deliveries [R. T. 64-65]. The dispatcher does not go out and check the freight on the truck [R. T. 119]. The driver then gets in his truck and leaves the loading dock.

Appellant was employed by West Coast Cartage as a truck driver [R. T. 53]. He loaded his truck out of loading door number 11 [R. T. 59, 168] and made deliveries to Santa Monica, Culver City, Venice and parts of West Los Angeles [R. T. 95, 272].

On March 25, 1966, appellant came to work at West Coast Cartage and loaded his truck [R. T. 281]. At the time appellant started to load his truck one carton had been placed on the truck by a night loader, Robert Carreno [R. T. 117, 159]. Appellant loaded the remainder of his truck without assistance [R. T. 122, 281, 292, 325, 333-336]. After he loaded the truck, he closed the doors on the truck and latched them [R. T. 123]. He then took his driver's load record to the dispatcher's window [R. T. 123]. He handed his driver's load record to the dispatcher and made no comment concerning his load [R. T. 209, 221].

The general manager of West Coast Cartage told the dispatcher to give the load record back to appellant as his load was

going to be checked [R. T. 56]. Appellant was told that his load was to be checked and that he was to give his load record to either Mr. See or Mr. Richardson who would check his load [R. T. 56-57]. Appellant then turned around, walked right by Mr. See, opened the doors on his truck and started to unload [R. T. 57, 125]. Appellant had unloaded eleven cartons before he was stopped by Mr. See [R. T. 126]. Mr. See then had the entire truck unloaded and checked all the freight against appellant's driver's load record [R. T. 128]. He found that out of the entire load there were five shipments consisting of 25 cartons for which appellant had either no bill of lading or had folded the bill of lading to indicate the freight was not on his truck. All twenty-five of these cartons were located at the immediate rear of appellant's truck, with a space of four to five feet between those cartons and the remainder of his load [R. T. 132].

An examination of the five shipments disclosed the following information:

1. One carton of furniture addressed to H. G. Leroy, 3300 Stoner Avenue, Los Angeles, California. This carton was loaded at the rear of the truck isolated with the other 24 from the remainder of the load [R. T. 132]. The bill of lading was folded indicating the freight was not on his truck [R. T. 129].

2. Thirteen cartons of shoes addressed to Joseph Bloom, c/o Charlstons, 3816 Culver Center, Culver City, California. Appellant had thirteen cartons of this seventeen-carton shipment on his truck [R. T. 129, 130]. The bill of lading was

folded indicating appellant did not have this freight on his truck [R. T. 130]. These thirteen cartons were located at the immediate rear of the truck although the appellant's driver's load record indicated that they would have been delivered on his ninth stop [R. T. 132].

3. Two cartons of clothing addressed to Fredericks of Hollywood, 6608 Hollywood Boulevard, Hollywood, California. Appellant had these cartons on his truck without a bill of lading [R. T. 130]. They were located at the immediate rear of the truck [R. T. 132]. This delivery was not in appellant's assigned area [R. T. 272]. It was delivered by an outside contract carrier, Pacific Motor Truck [R. T. 130]. The carton had a circled number 48 in green crayon which indicates that it should have been at the 48 spot, not appellant's spot number 11 [R. T. 82].

4. Six cartons of shoes addressed to Rains Shoe, 466 East Main Street, Ventura, California. These six cartons were located at the rear of appellant's truck and he had no bills of lading for them [R. T. 131, 132]. One of the cartons had the circled number 47 and 48 written on the side in green crayon. This indicates that it went to the 48 area where it was again assigned to the 47 spot [R. T. 80]. The 47 spot is another trucking company. It would go to this trucking company because Ventura is out of the delivery area of West Coast Cartage [R. T. 80].

5. Three cartons of clothing addressed to Jerry Brills, 1408 3rd Street, Santa Monica, California. These cartons were located at the immediate rear of appellant's truck [R. T. 131-132].

Appellant had no bill of lading for these cartons [R. T. 131].

Appellant was questioned on two separate occasions with regard to the presence of these cartons on his truck [R. T. 59, 128]. On both occasions he indicated he was going to deliver some of the freight for Jerry Andrade [R. T. 59, 128]. He also indicated that he confused the shoes with a White Front Stores delivery [R. T. 59]. Jerry Andrade testified that he did not request appellant to deliver freight [R. T. 168], and further that White Front shoes arrive in a special kind of carton that is not similar to the ones found on appellant's truck [R. T. 178].

It was stipulated that the five shipments of goods were moving in interstate commerce [R. T. 41]. It was further stipulated that the total value of the goods mentioned in the indictment is $5,920.45 [R. T. 43].

IV

ERRORS SPECIFIED BY APPELLANT

The appellant has specified the following points on appeal: 3/

1. It was error to deny appellant's motions for judgment of acquittal, made at the end of the Government's case, defendant's case and renewed after return of the jury verdict, where the West Coast Cartage Company at all times

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3/ Appellant's Opening Brief.

retained possession of the freight, so that no theft could have occurred.

2. It was error to deny appellant's motions for judgment of acquittal or for a new trial when the evidence reasonably indicated mistake, carelessness, and processing of freight according to the usual company procedures, thereby negating any intent to convert the goods to appellant's use.

3. It was error to deny appellant's motion for judgment of acquittal or for a new trial because there was insufficient evidence to uphold a verdict of guilt.

V

ARGUMENT

A. THE EVIDENCE IS SUFFICIENT TO SHOW AN UNLAWFUL TAKING OR CARRYING AWAY FROM A FREIGHT PLATFORM.

The appellant is charged with a violation of Title 18, United States Code, Section 659. That statute is framed in the disjunctive. It reads in pertinent part, " . . . whoever embezzles, steals, or unlawfully takes, carries away . . . from a platform . . . with intent to convert to his own use . . . " shall be guilty of an offense. The indictment, however, is framed in the conjunctive. It charges that appellant "stole and unlawfully took and carried away, with the

intent to convert to his own use, from a platform . . . " certain shipments [C. T. 2-3]. While the indictment charges in the conjunctive it is sufficient that the government prove appellant stole or unlawfully took or carried away from a platform certain goods with the requisite intent.

Crain v. United States, 162 U.S. 625 (1895);

Cunningham v. United States, 356 F. 2d 454 (5th Cir. 1966).

The evidence introduced by the government was sufficient to show that appellant unlawfully took or carried away the five shipments of goods from the West Coast Cartage freight platform. When appellant came to work on March 25, 1966, only one carton had been placed on his truck [R. T. 117, 159]. The remaining cartons were on the loading dock. To load the truck it was necessary for the appellant to pick up the cartons and transfer them from the loading dock to the truck he was assigned. This act of moving the cartons from the loading dock was at common law a sufficient asportation when coupled with the proper intent to constitute theft. For at common law any removal, however slight, was sufficient to constitute the required asportation. People v. Meyer, 75 Cal. 383 (1888). The rule would be the same in the interpretation of 18 U.S.C. §659. Sterling v. United States, 333 F. 2d 443 (9th Cir. 1964).

The appellant loaded the remainder of his truck without assistance [R. T. 122, 281, 292, 325, 333-336]. He then closed and latched the doors [R. T. 123]. He took his driver's load record

and handed it to the dispatcher [R. T. 123]. On a normal day the dispatcher would remove the folded bills of lading from the driver's load record [R. T. 64]. These bills are retained in order that the dispatcher may attempt to locate the freight on the loading dock [R. T. 64-65]. The dispatcher does not go out to a driver's truck and check the load against the load record [R. T. 119]. He gives the driver his delivery copies of the bills of lading and the driver leaves [R. T. 64].

When the appellant loaded his truck and closed the doors he had removed the cartons from the dock without authority. On three of the five shipments he had no bills of lading. A driver was instructed not to load cartons without bills of lading [R. T. 71]. On the other two shipments he had folded the bills of lading. Folded bills of lading indicate that freight is not on a truck [R. T. 64]. As to each of the five shipments, the West Coast Cartage Company records would indicate that the freight had either not arrived on the loading dock or although it had arrived it was somewhere on the loading dock. In the normal course of business, West Coast Cartage Company would have no knowledge that appellant had loaded the 25 cartons of goods on his truck. Thus at the time appellant presented his load record to the dispatcher to pull the folded copies, the shipments on his truck were under his control. He had clearly asserted control over the goods by removing them from the loading dock and placing them in his truck.

The appellee can find no case parallel to these facts. Perhaps the closest in argument is Kelley v. United States, 166 F. 2d

343 (9th Cir. 1948). In Kelley a custodial employee of the United States Post Office was charged with secreting, embezzling, detaining, delaying and opening mail. The evidence showed that two test mail packages were deposited at different locations in the post office where appellant would pass in the course of his janitorial duties. A postal inspector observed the appellant to pick up one of the packages, throw it on his pile of trash, and sweep it away. The trash was then placed in a trash hamper. Shortly thereafter the appellant's trash hamper was examined and it was found to contain both test packages. Appellant claimed that the evidence failed to show that he had committed any of the acts charged in the indictment. This assertion was predicated on the theory that appellant's throwing the packages into his trash collection did not remove them from the mail or the custody of the post office. It was shown that the trash collected by custodial employees customarily went to the post office basement where it was sorted before disposal. Thus the trash hamper was under Post Office control. This Court held that the existence of the basement check procedure made appellant's diversion of the packages no less unlawful. From the evidence, it was clear that appellant took the packages into his possession when he unlawfully removed and concealed them: the crime was then completed. Kelley v. United States, supra, at 346. The argument in Kelley would seem to control in the case now before the Court. Our case is even stronger for the reason that in the normal course of events there would be no check of appellant's truck where as in Kelley the

mail hamper would be checked in the basement. Further, the fact that appellant had not entered the truck and started to drive away from the dock before he was stopped should not control. In Kelley, the letter was not removed from the hamper by the appellant.

Therefore, the appellant herein had taken or carried away the goods from the loading dock when he removed them from their proper location and placed them in his truck.

B. THE EVIDENCE WAS SUFFICIENT TO PROVE APPELLANT INTENDED TO CONVERT THE CARTONS TO HIS OWN USE.

For the appellee to meet its burden of proof, it is necessary to prove that the appellant unlawfully took or carried away certain goods with, "the intent to convert them to his own use". As the appellee cannot look into the mind of the appellant, it is required to meet this burden of proving appellant's state of mind by circumstantial evidence.

Cramer v. United States, 325 U.S. 1 (1945).

The appellant loaded all but one carton on his truck. When the truck was unloaded and the cartons checked against his driver's load record, it was discovered that out of the entire load there were but five shipments on which the appellant had erred. These five shipments contained 25 cartons for which appellant had either no bill of lading or had folded the bill of lading. All 25 of these cartons were located at the immediate rear of the truck, with a space of four to five feet between them and the remainder of the

load [R. T. 128-132]. The fact that the remaining 475 cartons on the truck were loaded correctly would indicate that appellant took care in loading [Government Exhibit 47] and that he checked the cartons against the bills of lading before placing the cartons on his truck. And yet he had two shipments of cartons with addresses clearly outside of his delivery area on his truck [R. T. 80, 272]. Further these cartons had circled spot numbers that did not correspond with appellant's delivery door [R. T. 80, 82]. In the other three shipments he had loaded the cartons without a bill or loaded the cartons and folded the bill.

Appellant's conduct further demonstrates his criminal intent. When he took his load record to the dispatch window he was directed to give it to Mr. Richardson or Mr. See who would check his load [R. T. 56-57]. Appellant then turned and walked right past Mr. See and started to unload [R. T. 57, 125]. Mr. See then approached appellant and checked the load for discrepancies. He found the five shipments and when appellant was confronted with the discrepancy in his load he had two explanations. He indicated to two persons, Mr. See and Mr. Cowden, that some of the cartons were being delivered for Jerry Andrade and others had been mixed up with a White Front shoes delivery [R. T. 59, 128]. Jerry Andrade testified that he did not request appellant to deliver any cartons for him [R. T. 168]. Further appellant denied making these statements at the time of trial [R. T. 305-306]. White Front shoes are made by one manufacturer, Morris Shoe [R. T. 229]. The shoes that appellant allegedly mistook for White Front shoes

were Florsheim shoes and Florsheim shoes were not sent to White Front stores [R. T. 229]. Finally, White Front shoes came in on easily distinguishable cartons that are not similar to the cartons on appellant's truck [R. T. 178].

Appellant claims that the evidence showed merely carelessness or mistake. 4/ The appellee admits that mistakes frequently occur on the loading dock. However, the evidence elicited during the trial indicates that the loading of the cartons was an intentional act on appellant's part to convert the cartons to his own use. For as Mr. See testified he has never known of a situation where 25 cartons addressed to five different consignees were loaded by mistake [R. T. 136].

C. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE VERDICT.

The jury, by its verdict of guilty, resolved all factual doubts in favor of the government.

It was stipulated that the shipments were moving in interstate commerce and that the total value of the goods mentioned in the indictment was $5,920 [R. T. 43]. The remainder of the evidence was set forth in detail in the statement of facts and argued in Points A and B of Appellee's Brief. To again set forth that evidence would be repetitious.

4/ Appellant's Brief, page 16.

Viewing the evidence and all inferences which may reasonably be drawn therefrom in the light most favorable to the government, the evidence was sufficient to support the verdict of guilty.

Noto v. United States, 367 U.S. 290 (1961);

Byrne v. United States, 327 F. 2d 825 (9th Cir. 1964);

Mosco v. United States, 301 F. 2d 180 (9th Cir. 1962).

VI

CONCLUSION

For the reasons above stated, the judgment of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Roger A. Browning

ROGER A. BROWNING
Assistant U. S. Attorney